

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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CURTIS GIOVANNI FLOWERS,)
Petitioner,)
v.) No. 17-9572
MISSISSIPPI,)
Respondent.)
- - - - -

Pages: 1 through 58

Place: Washington, D.C.

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5 Petitioner,)

6 v.) No. 17-9572

7 MISSISSIPPI,)

8 Respondent.)

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11 Washington, D.C.

12 Wednesday, March 20, 2019

13

14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 10:16 a.m.

17

18 APPEARANCES:

19 SHERI LYNN JOHNSON, ESQ., Ithaca, New York; on behalf
20 of the Petitioner.

21 JASON DAVIS, Special Assistant Attorney General,
22 Jackson, Mississippi; on behalf of the Respondent.

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1 PROCEEDINGS

2 (10:16 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 17-9572, Flowers
5 versus Mississippi.

6 Ms. Johnson.

7 ORAL ARGUMENT OF SHERI LYNN JOHNSON
8 ON BEHALF OF THE PETITIONER

9 MS. JOHNSON: Mr. Chief Justice, and
10 may it please the Court:

11 The only plausible interpretation of
12 all of the evidence viewed cumulatively is that
13 Doug Evans began jury selection in Flowers VI
14 with an unconstitutional end in mind, to seat
15 as few African American jurors as he could.

22 If we look at the numbers of his --
23 regarding his questioning, they are likewise
24 stark. He asked of the struck African American
25 jurors an average of 29 questions. He asked of

1 the seated white jurors an average of 1.1
2 questions.

3 But these numbers do not stand alone.

4 Mr. Evans was twice found to have discriminated
5 on the basis of race in the exercise of his
6 peremptory challenges against African American
7 defendants in trials of the same case against
8 the same defendant.

9 There is no one who has a record of
10 discrimination, adjudicated discrimination,
11 like that of Mr. Evans.

12 JUSTICE ALITO: The history of the
13 case prior to this trial is very troubling, and
14 you've summarized that. And it is -- it is
15 cause for concern and is certainly relevant to
16 the decision that ultimately has to be made in
17 the case. But if we were -- and I'm not
18 suggesting that this is the way it should be
19 analyzed; this is not the way it should be
20 analyzed -- but if we were to disregard
21 everything that happened before this trial, and
22 we looked at the strikes of the black
23 prospective jurors as we would in any other
24 Batson case, do you think you'd have much
25 chance of winning?

1 MS. JOHNSON: The evidence still is
2 clear and convincing that Mr. Evans acted with
3 discriminatory motivation in this case, even if
4 we set aside his history and his -- the reasons
5 that he was unwilling to tell the truth in
6 previous cases.

7 JUSTICE ALITO: I mean, if look at --
8 at the jurors in question one by one, there are
9 aspects that I think would cause any prosecutor
10 anywhere to want to get that jury -- that juror
11 off the jury. There's a juror who said that
12 she -- she couldn't view the evidence
13 objectively. She couldn't make a decision
14 based just on the evidence.

15 There's one who said that she --
16 because of her acquaintance with members of the
17 Flowers family, she would lean toward the
18 defendant. Another one who admitted that she
19 made a false statement on her juror
20 questionnaire because she'd say anything to get
21 off the jury.

22 I mean, do you think those are --
23 those are Batson claims that would likely
24 succeed if this troubling history had not
25 preceded this case?

1 MS. JOHNSON: This Court has demanded
2 a sensitive inquiry into all of the
3 circumstances that prove racial discrimination.
4 And, again, even setting aside his history,
5 there are many circumstances here that suggest
6 racial -- racial motivation.

7 First, as I already said, there is an
8 extraordinary record of disparate questioning.
9 And the disparate questioning is not limited to
10 those numbers but to the tone of his
11 questioning. I believe that one of the -- the
12 responses that you quoted came from an
13 extremely aggressive pursuit of an African
14 American juror who initially said she would not
15 be troubled and ultimately said it's possible.

16 Now, of course, a prosecutor could
17 take that approach with every juror. If he
18 took that aggressive approach with every juror,
19 then there would be nothing to complain about.
20 But he did not take that approach with white
21 jurors.

22 And then there is his out-of-court
23 investigation of three African American jurors.
24 And then there are --

25 JUSTICE ALITO: But what -- what's

1 wrong with that? Again, putting aside the
2 reasons to be suspicious, if a juror says, I
3 don't -- I didn't work -- I don't work closely
4 with the defendant's sister, I don't work close
5 to the defendant's sister, and the prosecutor
6 has reason to suspect that's not true, is there
7 something wrong with the prosecutor going to
8 the human relations person at that place of
9 employment and bringing that person in to
10 testify they actually work nine to ten inches
11 apart? Is something wrong with that?

12 MS. JOHNSON: There's nothing wrong
13 with that if there was reason to disbelieve the
14 juror. The juror volunteered that she knew
15 her, that she worked in that place. There --
16 Mr. Evans cited no reason that he should not
17 believe her.

18 But, also, what happens after that is
19 somewhat suspicious, which is he brings someone
20 in to say: Well, they worked very close
21 together. And that someone says: And I could
22 produce the evidence. And when asked to
23 produce the evidence of that, the records that
24 produce it, he doesn't come back with that
25 evidence.

1 So I think we could certainly -- a
2 prosecutor could --

3 JUSTICE SOTOMAYOR: Wait.

4 MS. JOHNSON: -- and a rich prosecutor
5 might investigate all --

6 JUSTICE ALITO: What is your strongest
7 --

8 JUSTICE SOTOMAYOR: Did he -- did he
9 have that witness ready that same day, or did
10 --

11 MS. JOHNSON: No, he brought the
12 witness back the next day.

13 JUSTICE SOTOMAYOR: The next day,
14 okay.

15 JUSTICE ALITO: What is your strongest
16 strike?

17 MS. JOHNSON: I -- I think the most --
18 the clearest case is that of Carolyn Wright.
19 Carolyn Wright -- about Carolyn Wright, he made
20 three false statements. The first statement he
21 made was that her wages were garnished. That
22 was not --

23 JUSTICE ALITO: Well, actually, we
24 have found that, in the record with a state
25 exhibit on it, a judgment that shows that her

1 wages were garnished.

2 MS. JOHNSON: No, the wages -- there's
3 a mark that shows that there was such a
4 request, but both the trial court and the
5 Mississippi Supreme Court looked at that record
6 and found that her wages had not been
7 garnished. And then --

8 JUSTICE ALITO: Well, we can look at
9 that. We can look at the judgment. But the
10 fact remains that she was -- this was -- one of
11 the victims was the proprietor of -- of a
12 family-owned store, right? That's a
13 family-owned store?

14 MS. JOHNSON: Correct.

15 JUSTICE ALITO: And the store -- the
16 store sued her?

17 MS. JOHNSON: Well, the store sued
18 her. The victim herself had not sued her.

19 JUSTICE ALITO: Well, but the store
20 did.

21 MS. JOHNSON: It's the son-in-law
22 later that sued her.

23 JUSTICE ALITO: But, normally,
24 wouldn't that -- you know, again, put aside the
25 history. We -- but we can't -- in the end, we

1 can't do it, but if you did, don't you think a
2 prosecutor or any attorney would be very wary
3 of having a -- a juror who had been sued by one
4 of the parties?

5 MS. JOHNSON: I think that if this
6 prosecutor had pursued bias with respect to
7 white jurors as well as African American
8 jurors, and then made that strike, then that
9 would be a strike that would be a permissible
10 strike. But, in fact, he didn't do that.

11 So, first of all, I do want to notice
12 that this was one of four victims. It does
13 seem rather unlikely that a person in a
14 quadruple homicide case would be biased by a
15 subsequent suit of one of the relatives. But,
16 even if we thought that that were true, one
17 would have imagined that the prosecutor would
18 have inquired about bias with respect to the
19 other victims.

20 JUSTICE GINSBURG: Wasn't there a
21 question asked of the entire array of whether
22 they had any debts to the -- to the store?

23 MS. JOHNSON: Yes, but there was no
24 question asked about suits or disputes with
25 other -- with the other three victims, nor was

1 there an inquiry into bias that I think any
2 rational prosecutor would have made if
3 concerned, truly, about bias, which was
4 lawsuits, prosecutions of the jurors and their
5 close relatives by his office.

6 The prosecutor made no inquiry about
7 that. If you were worried about bias, you
8 would be worried about that. If you were --

9 JUSTICE SOTOMAYOR: Did he even ask
10 Ms. Wright how she felt about that suit and
11 whether it would affect her in this case?

12 MS. JOHNSON: In fact, she was asked
13 about the suit. And when she was asked about
14 that suit, what she said is that she had paid
15 the debt and that she had no ill will toward
16 the parties.

17 And, indeed, if we follow up on this
18 reason, I think this reason is especially
19 suspicious because he cited the same reason
20 with respect to Edith Burnside.

21 So, first of all, he said it with
22 respect to Edith Burnside. He repeated the
23 false statement that her wages had been
24 garnished, despite the fact of having been
25 called by the trial court on it the first time,

1 and then he said that he was striking her in
2 part on that basis.

3 But Ms. Burnside had --

4 JUSTICE SOTOMAYOR: Can you go back,
5 and -- and just slow down a second? You said
6 to Justice Alito that that record in -- that
7 state record that says something about
8 garnishment, that the state courts found that
9 that was not adequate.

10 Could you explain why not?

11 MS. JOHNSON: Well --

12 JUSTICE SOTOMAYOR: That judgment in
13 the record, what is it or --

14 MS. JOHNSON: The judgment --

15 JUSTICE SOTOMAYOR: That -- it's not a
16 -- it's a form in the record, but what does it
17 mean?

18 MS. JOHNSON: The form in the record
19 reflects a suit, and there's a little check by
20 garnishment. But, if you look at the order at
21 the end, there is no garnishment order.

22 The trial court looked at that and the
23 Mississippi Supreme Court looked at that. And
24 I think they are the experts about what their
25 documents mean. And they said there was no

1 garnishment.

2 JUSTICE GORSUCH: What if -- what if
3 it turned out there were a garnishment? How
4 would that affect your argument, if at all?

5 MS. JOHNSON: Well -- well, then that
6 would mean that he only made two false
7 statements about Juror Wright. The two false
8 statements were that she knew Flowers' sister,
9 Cora, and that she knew Flowers' sister,
10 Sherita. So then there would be two.

11 But if I could go back for a moment to
12 Ms. Burnside, when he repeated the story, I
13 think the -- the pretext of this reason is
14 apparent when we look at Ms. Burnside.

15 Ms. Burnside worked for Ms. Tardy.

16 Ms. Burnside worked for Ms. Tardy, caring for
17 her mother. Ms. Burnside was helped during her
18 divorce by Ms. Tardy.

19 So whatever she might have felt
20 negative about the son-in-law, the feelings she
21 would have had about the victim herself could
22 only have been positive. And yet he cited this
23 same reason.

24 When we look at that, what we see --
25 JUSTICE ALITO: Didn't Juror Burnside

1 also say repeatedly she didn't want to judge
2 anybody?

3 MS. JOHNSON: No, she did not -- oh,
4 Juror Burnside said --

5 JUSTICE ALITO: Yes.

6 MS. JOHNSON: -- that she did not want
7 to judge anyone. She did say that. But I
8 think --

9 JUSTICE ALITO: And you think that's
10 not a legitimate reason for -- for striking a
11 juror who's going to have to judge whether
12 someone who's accused of a serious crime is
13 guilty or not?

14 MS. JOHNSON: That is a legitimate
15 reason for striking a judge -- I'm sorry, for
16 striking a juror.

17 (Laughter.)

18 MS. JOHNSON: But the problem -- the
19 problem isn't whether the reason is a
20 legitimate reason but whether the reason was
21 pretext.

22 And when we look at what he did with
23 respect to citing the relationship having been
24 sued by the Tardys, it looks like everything
25 he's saying is pretext.

1 And if I could also go back to the
2 rest of your question about Juror Wright. So
3 there were three misrepresentations with
4 respect to Juror Wright.

5 There was also -- they also cited the
6 number of defense witnesses that she knew, but
7 the prosecutor, Doug Evans, did not question
8 prospective white jurors Waller, Lester,
9 Blalock, and Fields about their relationships
10 with witness -- with white -- with defense
11 witnesses, nor did he strike them when he had
12 an opportunity to do so.

13 JUSTICE ALITO: But isn't it true she
14 also worked with the defendant's father?

15 MS. JOHNSON: She worked in the same
16 location as the defendant's father, but --

17 JUSTICE ALITO: She worked in the same
18 store, right?

19 MS. JOHNSON: She worked in the same
20 store.

21 JUSTICE ALITO: At the world's
22 smallest Walmart.

23 MS. JOHNSON: That's what the --

24 JUSTICE ALITO: That's what they said.

25 MS. JOHNSON: -- that's what the trial

1 court described it as. But -- but it is
2 important to notice that when she was asked
3 does he still work there, she didn't even know
4 if he still worked there.

5 So there's really --

6 JUSTICE ALITO: Yeah, but did she
7 still work there?

8 MS. JOHNSON: She did.

9 JUSTICE ALITO: I thought she had
10 left?

11 MS. JOHNSON: No, that's another juror
12 with respect to -- I believe with respect to
13 Cora Flowers. But what I wanted to -- she
14 didn't know if he still worked there, but --

15 JUSTICE SOTOMAYOR: Compare her with
16 Pamela Chesteen. That comparison is the one
17 that I'm most interested in.

18 MS. JOHNSON: I was about to do that.
19 And so I think that it's true that working with
20 someone under some circumstances might produce
21 bias.

22 It is interesting that the only thing
23 she said that might suggest the closeness of
24 the relationship is that she didn't know
25 whether he still worked, and the -- and Evans

1 did not ask about the closeness of the
2 relationship.

3 Nor did he worry about the closeness
4 of the relationship with Juror Chesteen and
5 four or I think it's maybe even five of
6 Flowers' family members. Juror Chesteen worked
7 as a teller in a bank where all five of them
8 came and she waited --

9 JUSTICE SOTOMAYOR: She said that she
10 knew the father as well.

11 MS. JOHNSON: Yes, she knew the father
12 and the mother and two sisters and a brother.
13 And Doug Evans was not interested in pursuing
14 --

15 JUSTICE GINSBURG: But isn't that
16 relationship of a bank teller to someone who
17 comes to make a deposit different from someone
18 who is a coworker and it would encounter
19 someone in the work setting on a daily basis?

20 MS. JOHNSON: It is a different
21 relationship or it could be a very different
22 relationship. We can't actually even know the
23 closeness of either relationship unless there
24 was inquiry.

25 But Doug Evans did not make that kind

1 of an inquiry. Indeed, what he said to Juror
2 Chesteen is -- and that was a purely
3 professional relationship. He didn't ask
4 whether she had a close relationship, whether
5 she was worried. He instead presumed,
6 reassured, everyone that she did not.

7 CHIEF JUSTICE ROBERTS: All the -- all
8 the -- the questions that we've been addressing
9 here are the same sort of questions you would
10 get in a typical Batson case, looking at the
11 circumstances of the potential jurors that were
12 struck in this case.

13 But, I mean, of course, as -- as my
14 colleagues have recognized, the case is unusual
15 because you have the extensive history. And I
16 think that's probably why the case is here for
17 -- for review.

18 And I'm interested, because,
19 obviously, the rule we adopt will apply in
20 other cases, how far your argument that we need
21 to look at the past history is -- is pertinent.

22 If -- if the prosecutor had -- had one
23 Batson violation in his 30-year career, 20
24 years ago, is that something that should be
25 brought out and pertinent in the assessment of

1 the current Batson challenges?

2 MS. JOHNSON: Mr. Chief Justice, may I
3 say one thing about Carolyn Wright that I don't
4 want to forget?

5 CHIEF JUSTICE ROBERTS: Sure.

6 MS. JOHNSON: The other thing that's
7 noteworthy about her is that she put on her
8 death penalty questionnaire that she was
9 strongly in favor of the death penalty.

10 So, when we look at her as a whole, a
11 -- a -- a prosecutor who was looking in a
12 colorblind way would have been attracted to
13 her.

14 CHIEF JUSTICE ROBERTS: Now for my
15 question?

16 MS. JOHNSON: But now -- now for your
17 question. And I apologize, but I was worried I
18 would not get back to that.

19 So I think this is an extraordinary
20 case. I have combed the cases and I cannot
21 find any case --

22 CHIEF JUSTICE ROBERTS: No, no, I know
23 it's -- you're -- you're fighting the
24 hypothetical.

25 My question is 30 years, a Batson

1 violation 20 years ago, is that pertinent to
2 the consideration in the current case?

3 MS. JOHNSON: I'm sorry, I didn't
4 understand the question then. Yes, it is
5 pertinent, but it's weakly probative.

6 So I think, when we conduct a
7 consensitive inquiry, we look, as we would in a
8 criminal case, we look at how recent a
9 fabrication has been, whether it's on a
10 relatively similar matter, whether the person
11 has the same motive.

12 So a case that occurred 30 years ago
13 would be very different in terms of motive. It
14 also would be quite different in terms of the
15 established law of this Court.

16 CHIEF JUSTICE ROBERTS: Well --

17 MS. JOHNSON: So someone who violates
18 Batson before it's announced or someone who
19 violates Batson immediately thereafter, that's
20 less probative than someone who has done so
21 repeatedly.

22 CHIEF JUSTICE ROBERTS: So -- so what
23 is -- what is the rule you would have us adopt
24 as a general rule, not just in a particular
25 case as extreme as this one?

1 MS. JOHNSON: The general rule is a
2 rule that you have already adopted, which is
3 that, in Stage 3, every factor that bears upon
4 credibility is relevant.

5 So that's the general rule. And I
6 suppose if we say that in another way, the
7 Mississippi Supreme Court asked only the
8 question of is there a juror left -- is there a
9 reason for this juror left standing that is not
10 contradicted by the record and exactly matched
11 by a white juror.

12 And that's not the right rule. The
13 right rule is a sensitive inquiry.

14 JUSTICE KAVANAUGH: Even --

15 JUSTICE GORSUCH: Go ahead. Your
16 turn.

17 JUSTICE KAVANAUGH: No, you go first.
18 (Laughter.)

19 JUSTICE GORSUCH: All right, all
20 right.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch.

23 JUSTICE GORSUCH: All right. I want
24 to pursue the Chief Justice's question just a
25 little bit further so I can understand what

1 you'd have us do in the next case.

2 Let's just suppose this case, trial 6,
3 was perfect and the strikes were without taint
4 otherwise, but we have this history with this
5 prosecutor.

6 Would that be a problem still, or
7 would there be no Batson violation in those
8 circumstances?

9 MS. JOHNSON: If there weren't eight
10 misrepresentations of fact --

11 JUSTICE GORSUCH: Right.

12 MS. JOHNSON: -- disparate questioning
13 --

14 JUSTICE GORSUCH: Right, right.

15 MS. JOHNSON: -- all that stuff --

16 JUSTICE GORSUCH: Right. You're
17 fighting the hypothetical again.

18 MS. JOHNSON: -- and there's only the
19 history --

20 JUSTICE GORSUCH: Yeah, yeah. The
21 hypothetical is let's suppose that this case,
22 there were strikes, but they were explained by
23 non-discriminatory reasons. Yet we have --

24 MS. JOHNSON: And there were no other
25 --

1 JUSTICE GORSUCH: -- yet we have this
2 prosecutor with this history. What then? How
3 should the Court assess a case like that?

4 MS. JOHNSON: If there are no other
5 indicia of discrimination, then the defendant
6 has not met his burden of proof by proving
7 prior discrimination.

8 JUSTICE GORSUCH: Okay. So we need
9 discrimination in this trial in order to have a
10 Batson violation?

11 MS. JOHNSON: Yes.

12 JUSTICE GORSUCH: Okay. All right.
13 That's helpful. Thank you.

14 JUSTICE KAVANAUGH: My question was
15 about the history. I thought that Swain had
16 said that the history was relevant. In fact,
17 Swain said history was the only way you could
18 prove a violation. What Batson did was to say
19 no, you can look even at the individual case.
20 But Batson, as I read it, did not say you no
21 longer take account of the history.

22 Your reading of Swain and how Swain
23 and Batson interact?

24 MS. JOHNSON: I think that's entirely
25 correct, Your Honor. Even in Swain, a history

1 was relevant. And to look more broadly, in
2 Arlington Heights, this Court said that history
3 is relevant. So -- and in Miller-El said that
4 history was relevant.

5 So there isn't a new rule about
6 history being relevant. The Mississippi
7 Supreme Court ignored what this Court has
8 already said about history being relevant. And
9 --

10 JUSTICE GINSBURG: The court -- the
11 court --

12 MS. JOHNSON: -- the broader point,
13 that everything --

14 JUSTICE GINSBURG: -- the court said
15 it took account of the history. So what are we
16 to make of that?

17 MS. JOHNSON: Well, if there were --
18 if the court had taken account of its -- of the
19 history, it couldn't have come to this
20 conclusion. And I think there's many reasons
21 in the opinion to believe that they did not.

22 They said, considering the history, it
23 doesn't alter our opinion, and they pasted in
24 their prior opinion that was history blind.
25 They also said his -- his history does not

1 undermine his stated reasons.

2 That's wrong. It undermines those
3 reasons. It may or may not be sufficient, but
4 a history of will -- of a desire for a -- an
5 all-white jury, a history of willingness to
6 violate the Constitution, and a history of
7 willingness to make false statements to a trial
8 court, those things in the past with respect to
9 at least three other jurors, that does
10 undermine it.

11 And then I think, when we look at what
12 they actually did, there is no point in which
13 they say: Yes, we are more skeptical of the
14 reasons that he stated because he was dishonest
15 before. Or, yes, when I look at -- at the
16 false statements he made here, the eight false
17 statements he made here, those match with false
18 statements that he made before.

19 They never did that. So I think they
20 did not consider his history, nor did they
21 consider anything else that would be consistent
22 with this Court's insistence that we look at
23 the totality of the circumstances and conduct a
24 sensitive inquiry into.

25 JUSTICE KAGAN: Ms. Johnson --

1 JUSTICE GINSBURG: You say your
2 strongest case is Juror, potential juror,
3 Wright. One of your complaints is that there
4 were many more questions asked of African
5 American potential jurors, but that wasn't so
6 in Wright's case, that she was asked, I think,
7 only three questions. Is that --

8 MS. JOHNSON: That's correct.

9 JUSTICE GINSBURG: Yes.

10 MS. JOHNSON: But I think, you know,
11 it is -- actually, the relevance of the
12 disparate questioning is not merely to ask how
13 many questions this juror was asked. So it
14 might indeed be as the Mississippi Supreme
15 Court said that, with respect to some African
16 American jurors, it was legitimate to ask them
17 more questions because more of them knew
18 Flowers' family.

1 attitudes or anything else.

2 JUSTICE KAGAN: Ms. Johnson, some time
3 ago Justice Alito asked you about the
4 prosecutor's investigation of certain potential
5 jurors. And how many jurors did the prosecutor
6 separately investigate and were --

7 MS. JOHNSON: Three.

8 JUSTICE KAGAN: And all African
9 American?

10 MS. JOHNSON: All of them were African
11 American. And when defense counsel said he's
12 investigating African American jurors, there's
13 no evidence that he investigated anyone else,
14 he said nothing.

15 So he had an opportunity to say, oh,
16 I've investigated everyone. And he did not say
17 that.

18 JUSTICE KAGAN: And can I ask you
19 about the disparate questioning? Because you
20 referred to something which struck me when --
21 as I read through all of this, this is unlike
22 some Batson cases you see. It's a very small
23 town where everybody knows everybody,
24 apparently, or many people know many people.
25 And it's a largely segregated town, where you

1 might think that African Americans knew more
2 African Americans than they would whites or
3 vice versa.

4 So does that account for some of the
5 differential questioning? In other words, just
6 sort of looking at the environment and saying I
7 have to push more on whether X knew Y because,
8 given the circumstances of the town, X might
9 very well have known Y?

10 MS. JOHNSON: The Mississippi Supreme
11 Court said that it accounted for some of the
12 differential questioning, and I think that's
13 correct. There are more African American
14 jurors who report relationships with defense
15 witnesses or the defense family members.

16 But there are five -- five white
17 jurors who report such relationships and whom
18 the prosecutor did not ask questions about
19 those relationships. So --

20 JUSTICE GINSBURG: Such -- when you
21 say "such relationships," were they
22 relationships because of working at the same
23 place or living in the same neighborhood, in
24 the case of the white jurors?

25 MS. JOHNSON: They were -- none of the

1 relationships were working at the same place.
2 But when -- when he was asked -- when -- when
3 they were asked in group voir dire about whom
4 they knew, white jurors responded that they
5 knew defense witnesses, and they were not
6 questioned about those witnesses.

7 So we can't really know what the
8 nature of those relationships are if we don't
9 ask questions.

10 JUSTICE ALITO: Do you -- do you have
11 those names or is -- is that in your brief
12 someplace? I don't remember.

13 MS. JOHNSON: It is in the brief, but
14 it is Waller, Lester, Blaylock, and Fields, as
15 well as Chesteen.

16 JUSTICE SOTOMAYOR: I found it
17 strange, but maybe you can -- or unusual, I
18 should say, not strange, unusual that there
19 were some white jurors who had people accused
20 of crimes in jail, relatives accused of crimes
21 in jails. Were there any questions about how
22 that affected those white jurors?

23 MS. JOHNSON: No, there were no
24 questions about that at all of three of them
25 and I think a very brief question about -- for

1 two of them. And I think that goes to the
2 question of, was he really investigating bias
3 when he asked this question about being sued by
4 Tardy Furniture?

5 If you're really investigating bias,
6 you would be concerned about bias against your
7 office. And he was not interested in that.

8 With the Court's permission, I will
9 reserve the rest of my time for rebuttal.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 ORAL ARGUMENT OF JASON DAVIS
13 ON BEHALF OF THE RESPONDENT

14 MR. DAVIS: Mr. Chief Justice, and may
15 it please the Court:

16 The history in this case is troubling.
17 But the history is confined to this case, and,
18 as Mr. Chief Justice pointed out, it is
19 unusual.

20 There are -- this is the sixth trial
21 in this small town, a small town of
22 approximately 5,000 individuals. The
23 questioning of whether the makeup or the
24 limited number of individuals in the town was
25 one of the reasons for follow-up questions is

1 accurate.

2 At the outset, let me say that the
3 Mississippi Supreme Court's decision in this
4 case was commensurate with Batson and its
5 progeny. And I would return to Justice
6 Gorsuch's question of if we disengage this
7 troubling history -- and I agree, I'm not
8 suggesting that, as Justice Alito said;
9 however, if we take that out of the case, we --
10 we don't have any taints.

11 JUSTICE ALITO: Could I just ask --

12 MR. DAVIS: We can't be --

13 JUSTICE ALITO: -- a question of the
14 Mississippi law? Could the attorney general
15 have said, you know, enough already, we're
16 going to send one of our own people to try this
17 case, preferably in a different county, where
18 so many people don't know so many other people?
19 Could he have done that?

20 MR. DAVIS: Statutorily, the Attorney
21 General's Office is allowed to assist, is
22 allowed to take over, but only upon request by
23 that district attorney. So that was not an
24 option in this case. We were not so requested.

25 JUSTICE KAVANAUGH: You -- you said if

1 -- if we take the history out of the case. We
2 can't take the history out of the case.

3 MR. DAVIS: No, Justice Kavanaugh.

4 I'm not saying that's what I'm saying exactly
5 happened --

6 JUSTICE KAVANAUGH: It was 42 -- 42
7 potential African American Americans and 41 are
8 stricken, right?

9 MR. DAVIS: Yes, Your Honor, that is
10 correct.

11 JUSTICE KAVANAUGH: We have to --
12 that's relevant, correct?

13 MR. DAVIS: That is relevant, yes,
14 Your Honor. The -- as this Court has held in
15 Miller-El, history is part of the
16 consideration.

17 JUSTICE KAGAN: So you agree that it's
18 not only the adjudicated Batson violations that
19 are relevant but also the number of strikes
20 such as Justice Kavanaugh listed?

21 MR. DAVIS: I do with qualification.
22 There -- the strikes were unique. The strikes
23 in this case are supported in the record.

24 Each of the jurors that were struck
25 either worked with a relative, were related, or

1 knew, intimately, family members, the defendant
2 or his family members, up to and including one
3 juror who lied on her questionnaire and then
4 admitted to lying on the stand.

5 JUSTICE GINSBURG: You have a very
6 strange position on potential jurors who lied
7 because there was the case of white juror,
8 Huggins, who said he had no knowledge of the
9 Flowers case when, in fact, he was on a 2007
10 voir dire panel.

11 And you say: Oh, well, that doesn't
12 matter that -- that he lied because he didn't
13 admit to lying.

14 I think if someone lied and didn't
15 admit to it, that would be a count against that
16 person, rather than in that person's favor.

17 MR. DAVIS: And -- and the trial court
18 in this case made the distinction that the
19 juror who was struck for lying on her
20 questionnaire admitted on the stand that she
21 lied intentionally, which was not the case with
22 Juror Huggins.

23 And it would seem, it appeared, that
24 he -- his participation in the panel, and he
25 was dismissed long before he got anywhere near

1 selection, that he either forgot that or it
2 completely left his mind at the time he was
3 initially questioned.

4 JUSTICE SOTOMAYOR: But let's go back
5 to that. If we're looking at whether this is
6 pretext, Mr. Evans was willing to give an
7 excuse to this juror and keep him, despite the
8 fact that there was direct evidence that he
9 knew about the case. He was willing to accept
10 the white lie, but not a truthful answer under
11 oath in front of a judge.

12 Doesn't that suggest pretext to you?

13 MR. DAVIS: Again, Justice Sotomayor,
14 the -- the issue as it reads from the record is
15 that the juror who lied on her questionnaire
16 expressly admitted that she lied for the sole
17 purpose of getting off the jury.

18 JUSTICE SOTOMAYOR: Well --

19 MR. DAVIS: And -- and that doesn't --

20 JUSTICE SOTOMAYOR: -- I have to tell
21 you, if that were the case, I -- I don't think
22 one could take one juror and not push them on
23 those questionnaires and come up to an
24 intentional understatement or overstatement.

25 MR. DAVIS: Again, Your Honor, that

1 was -- and this is one of the issues with this
2 case, is that each one of these strikes that we
3 have, we don't have one single reason. We have
4 numerous --

5 JUSTICE SOTOMAYOR: That --

6 JUSTICE BREYER: All right. Let --
7 let's look at them. But you do have history
8 Trial 1: Five black juror possibles, uses
9 peremptories, strikes all five.

10 Trial two: Five black jurors
11 possible, uses all five, strikes all five
12 blacks. Okay.

13 Trial number three: There were 17
14 black possible. He uses only 15 this time.
15 Why? Because he ran out of peremptories. He
16 only had 15. All right.

17 Fourth trial: 16 black. He only
18 struck 11. That's because he only had 11
19 peremptories perhaps. All right?

20 Now we come to this trial with that
21 background. Okay. And I don't think it's
22 going to take much once you have that
23 background.

24 So now let's look at one black juror,
25 one white one, potential. Okay? Let's call

1 them 1 and 2. Both are women. Both are in
2 their mid-40s. Both have some college
3 education. Both strongly favor the death
4 penalty.

5 Now the potential black actually has a
6 brother serving as a prison guard. Now you
7 would have thought that might have favored the
8 prosecution in a prosecutor's mind. Okay. So
9 that's one difference. I don't think that cuts
10 in your favor.

11 Then have they ever had anybody
12 arrested, you know? No, neither has. And do
13 they know people in the case? Yeah. They each
14 know something over 30 people, same, same,
15 same, same.

16 Now is there a connection with the
17 Flowers family? Well, the black juror did, in
18 fact, possibly work at some distance, we don't
19 know quite what, with the father at Walmart,
20 and the white one knew his father, mother,
21 sister, cousin, through her work as a bank
22 teller.

23 And then we get the last thing, which
24 the Mississippi Supreme Court thought was so
25 crucial, is that the black potential juror was

1 sued for overdue credit and maybe she paid the
2 garnishment of \$30. I don't know.

3 But the white juror had been a friend
4 of the victim's daughter in high school. Okay?
5 There we have it. Potential black, potential
6 white. And we have the whole background.

7 Now, looking at that, you tell me,
8 what was the difference as to why he could
9 strike, if that background, Carolyn Wright, the
10 potential African American juror who was Number
11 4, and Pamela Chesterton, the potential white
12 American juror who was Number 17.

13 What's the difference? What's the
14 difference given all those similarities?

15 MR. DAVIS: Juror 14, Carolyn Wright,
16 was struck because she was sued by Tardy.

17 JUSTICE BREYER: Yeah.

18 MR. DAVIS: Juror 14, Carolyn Wright,
19 worked with the defendant's father, Archie, at
20 Walmart.

21 JUSTICE BREYER: Yep.

22 MR. DAVIS: The distinction would be
23 --

24 JUSTICE BREYER: Wait, wait. You
25 didn't add that Juror Number 17 had been a

1 friend of the victim's daughter in high school
2 and also knew Flowers' father, mother, sister,
3 and a cousin through her work as a teller at
4 the bank.

5 MR. DAVIS: Wright's relationship with
6 the father was a work relationship, an
7 employer/employee relationship. Chesteen was a
8 bank teller, admitted that she just saw them
9 coming in through the bank. So this was a --
10 an employee and customer relationship, which
11 the Mississippi Supreme Court made a
12 distinction.

13 JUSTICE BREYER: In other words, it
14 was closer, the first relationship?

15 MR. DAVIS: Well, the --

16 JUSTICE BREYER: And the record when I
17 read that will bear out that the first one
18 really was a closer relation than seeing them
19 every week or whatever as a bank teller.

20 MR. DAVIS: Well, the record --

21 JUSTICE BREYER: Will -- will it say
22 that? I don't think it will because I think
23 they said, well, how closely physically did you
24 work with the -- the father? And there was no
25 answer to that question.

1 MR. DAVIS: The -- the record will
2 bear out that the district attorney only struck
3 those individuals that worked with members of
4 his family. And that was consistent.

5 JUSTICE BREYER: Okay. So that's the
6 reason. The distinction is when I go back in
7 the record, I have to say, knowing Flowers'
8 father, mother, sister, cousin through the work
9 as a bank teller is not a good reason for
10 striking somebody. But working with Flowers'
11 father at some unknown distance at Walmart is.
12 And that's the crucial difference I will find.

13 There is a difference there, but is
14 there anything else? Because, after all, I
15 have the history, plus -- plus now I've
16 narrowed it down -- that's why I asked -- I've
17 narrowed it down to that being the difference.

18 MR. DAVIS: Again, Justice Breyer, I
19 would also say that one of the differing things
20 was that she was sued by Tardy.

21 JUSTICE BREYER: Yes.

22 MR. DAVIS: Which was a theme with at
23 least one other --

24 JUSTICE BREYER: Right. And so I also
25 should look at that and then decide whether

1 that really is more significant than the fact
2 that Number 17 was friends with the victim's
3 daughter in high school.

4 You know, sometimes you're friends
5 with your high school -- your high school pals
6 you don't forget.

7 So -- so I -- so those are the two
8 things I should look at. Is there anything
9 else?

10 MR. DAVIS: I think that's enough,
11 Your Honor.

12 JUSTICE KAGAN: I mean, in many --

13 JUSTICE BREYER: Well, I do too.

14 (Laughter.)

15 JUSTICE ALITO: Is there any --

16 JUSTICE KAGAN: -- in many respects,
17 Mr. Davis, Ms. Wright is a -- is a perfect
18 juror for a prosecutor. Right? She is -- she
19 strongly favors the death penalty. Her uncle
20 is a prison security guard. Her relative is
21 the victim of a violent crime.

22 Except for her race, you would think
23 that this is a juror that a prosecutor would
24 love when she walks in the door. Isn't she?

25 MR. DAVIS: Not if she works with the

1 defendant's family and not if she was sued by
2 the workplace of one of the victims. And --
3 and that's the distinguishing factor here.

4 JUSTICE GORSUCH: Counsel --

5 JUSTICE BREYER: I don't want to
6 imply, I'm sorry, that you have directed me to
7 the two relevant parts of the record, and
8 before I make up my mind definitely, I will
9 read those two relevant parts, both sides.

10 Okay?

11 CHIEF JUSTICE ROBERTS: Again,
12 counsel, again, we're sort of conducting this
13 as if it were one -- one case. And in terms of
14 a broader rule, do you -- do you recognize or
15 do we recognize in our precedent any
16 restriction on the prior history that can be
17 brought up with respect to a current -- current
18 case?

19 MR. DAVIS: No, Your Honor. And --
20 and far be it from me to presume the full basis
21 for the grant, but I certainly see that as one
22 of the issues before the Court, is, as Your
23 Honor asked, how far are we to go? And -- and
24 -- and what does it matter? What -- what part
25 does that history play?

1 CHIEF JUSTICE ROBERTS: But my point
2 is do you -- is there anything in our precedent
3 that suggests that there ought to be a
4 limitation on looking to the history of the
5 prosecutor involved?

6 MR. DAVIS: There's no limitation on
7 the history. I think certainly the precedent
8 says that you have to consider it. I'm not
9 aware of any language in Batson and its progeny
10 for this particular circumstance where we have
11 six trials by the same district attorney. I'm
12 not aware of any. This is a unique situation
13 in that regard.

14 JUSTICE GORSUCH: And -- and along
15 those lines, Justice Breyer has pointed out a
16 dichotomy that in other circumstances might be
17 explicable by an innocent reason.

18 But, if all of the history is
19 relevant, as you've acknowledged, how -- does
20 that -- what light does that shed on what
21 otherwise might appear to be an innocent
22 strike?

23 And when -- when should -- what rule
24 would you lay down -- I know that's hard to do,
25 but we're presumably taking cases to guide

1 future disputes, not just to resolve this one.

2 How -- how would you -- how would you
3 write that rule as to the relevance of the past
4 information with -- when we're looking at the
5 current trial?

6 MR. DAVIS: In responding to that,
7 Your Honor, let me say that when we use the
8 word "history," we are limiting it to this
9 case, this district attorney and his over 25
10 years of experience, having searched for
11 additional cases and no cases cited by the
12 Petitioner, outside of this case in regards to
13 a Batson violation.

14 So the history is limited here. The
15 question then is what to do in a case like
16 this. How much does the specter of those two
17 prior violations come into play in the -- in
18 the analysis in this?

19 I think it certainly has to be looked
20 at. I believe the trial judge --

21 JUSTICE SOTOMAYOR: Is it just the
22 specter of the two violations? Weren't there
23 two cases that were overturned or -- in which
24 prosecutorial misconduct -- at least the first
25 was overturned on prosecutorial misconduct.

1 They didn't even reach the Batson challenge.

2 MR. DAVIS: Yes, Your Honor.

3 JUSTICE SOTOMAYOR: But doesn't that
4 tell you something about this man's passion for
5 this case? I -- I don't even need to call it
6 anything else, but doesn't that tell you how
7 you should be looking at this case?

8 MR. DAVIS: I -- I can't speak to his
9 passion for the case, Your Honor. I can speak
10 to his pursuit of conviction in this in the
11 sense of the six trials, which -- in which
12 there -- there were --

13 JUSTICE SOTOMAYOR: But he didn't -- I
14 understand he didn't ask the attorney general
15 to step in, which he could have, to prosecute
16 the case. But I understand he lobbied two
17 legislators to try to change the venue,
18 legislatively. Is that correct?

19 MR. DAVIS: That's my understanding,
20 Your Honor.

21 JUSTICE SOTOMAYOR: So he could try
22 the case?

23 MR. DAVIS: Well, try the case outside
24 of Montgomery County.

25 JUSTICE SOTOMAYOR: Instead of getting

1 the attorney general to try the case?

2 MR. DAVIS: And -- and I would again
3 reiterate --

4 JUSTICE SOTOMAYOR: In his own county?

5 MR. DAVIS: Yes, Your Honor. And --
6 and we are strictly prohibited from inter --
7 interjecting ourselves in cases we tried, not
8 in this case, but in another case, and our
9 supreme court --

10 JUSTICE KAVANAUGH: In Batson --

11 MR. DAVIS: -- said you can't do that.

12 JUSTICE KAVANAUGH: Sorry, in Batson,
13 we held that a prosecutor cannot state merely
14 that he challenged jurors in the defendant's
15 case -- of the defendant's race on the
16 assumption or his intuitive judgment that they
17 would be partial to the defendant because of
18 their shared race.

19 That was really the critical sentence
20 in Batson, and the dissent disagreed with that.
21 The critical change. You can't just assume
22 that someone's going to be favorable to someone
23 because they share the same race.

24 And when you look at the 41 out of 42,
25 how do you look at that and not come away with

1 thinking what was going on there was what the
2 dissent in Batson said was permissible, that
3 the majority said was not permissible, that
4 there's a stereotype that you're just going to
5 favor someone because they're the same race as
6 the defendant?

7 MR. DAVIS: I respectfully, in this
8 case, in no way agree that there was some prior
9 determination made by the district attorney
10 that -- that because of this person's race,
11 they were not going to be favorable.

12 Again, this case has spanned some 23
13 years now in this small community. One of the
14 inherent problems of --

15 JUSTICE KAGAN: But I -- I guess I
16 don't understand how you can say this. In this
17 case, there were three adjudicated Batson
18 violations.

19 MR. DAVIS: Two.

20 JUSTICE KAGAN: Okay, two.

21 (Laughter.)

22 MR. DAVIS: Two. The -- Flowers III
23 and Flowers II both had adjudicated Batson
24 issues. That the trial court was aware of that
25 was evident. The same trial judge presided

1 over the fifth trial. And in this case, we had
2 the same defense counsel. Counsel moved in
3 motions that were offered in the fifth trial up
4 to and including, in Joint Appendix 42, Motion
5 Number 57, which was a motion to bar
6 prosecution from exercising peremptory strikes
7 at all or at least from exercising them against
8 non-white minority members.

9 Judge Loper adopted his prior rulings.
10 His ruling on that motion also included
11 caution, caution to both parties that if
12 there's any objections or challenges based on
13 demeanor or based on a juror's appearance, that
14 if it wasn't in the record, he was not going to
15 consider it.

16 JUSTICE ALITO: Did we have some --

17 JUSTICE SOTOMAYOR: I'm sorry,
18 counsel, did you just --

19 JUSTICE ALITO: -- didn't we say of
20 this -- go ahead.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor.

23 JUSTICE SOTOMAYOR: Did you just say
24 that the same judge who tried the fifth trial
25 also tried the sixth -- the sixth trial?

1 MR. DAVIS: Yes, Your Honor.

2 JUSTICE SOTOMAYOR: And wasn't he the
3 judge that ordered Mr. Evans to prosecute the
4 sole holdout juror in the fifth trial?

5 MR. DAVIS: There --

6 JUSTICE SOTOMAYOR: And didn't
7 Mr. Evans do that?

8 MR. DAVIS: There --

9 JUSTICE SOTOMAYOR: And the attorney
10 general take over the case and say there was no
11 basis for that prosecution?

12 MR. DAVIS: There were two jurors that
13 were bound over to the grand jury on the basis
14 of perjury. One pleaded guilty to that, and
15 the other was nolle-prossed. Again -- and that
16 was handled by the Attorney General's Office,
17 not my division, but another.

18 JUSTICE SOTOMAYOR: But I think the
19 attorney general nolle-prossed it because there
20 was no basis for that prosecution.

21 MR. DAVIS: I don't know that there
22 was not a basis. I just know that it was
23 nolle-prossed.

24 JUSTICE KAGAN: May -- may I ask you
25 about --

1 JUSTICE ALITO: Well, could we say in
2 -- in this case because of the unusual and
3 really disturbing history, this case just could
4 not have been tried this sixth time by the same
5 prosecutor? That he -- that he just cannot --
6 in light of the history, you just can't
7 untangle what happened before from the
8 particular strikes in this case?

14 And -- however, the record in this
15 case by no means supports the conclusion that
16 the Mississippi Supreme Court's decision ran
17 afoul of Batson or its progeny.

20 judge's being aware of the history.

21 Specifically, Judge Loper said, at -- the
22 transcript at page 314, "I know what Flowers
23 III said." He then cautioned the state: "I'm
24 going to look very closely at this case."
25 Again, the judge acknowledging that he would be

1 diligent in making sure the same type of error
2 did not occur again.

3 JUSTICE KAGAN: But what -- well, how
4 closely did he look? I mean, let's talk --
5 talk just about the questioning in this case.

6 The numbers themselves are staggering,
7 the number of questions that were asked to
8 African Americans versus whites. But more than
9 the numbers, if you look at the -- the way --
10 what these questions were targeted to do, let's
11 take, for example, the questions on the death
12 penalty. This prosecutor would question a
13 white person who said that he or she had
14 reservations about the death penalty. And the
15 questions are all designed to rehabilitate the
16 person. You know, the prosecutor would say:
17 Well, if the law required you to do it, you
18 could follow the law, couldn't you? And then
19 the person would say yes.

20 But if an African American said that
21 -- that he or she had qualms about the death
22 penalty, the prosecutor would say the exact
23 opposite. The prosecutor would say something
24 like, well, it would be really hard for you to
25 apply the death penalty then, wouldn't it?

1 So, in every case, this kind of
2 disparate questioning, you know, it -- it looks
3 as though he's -- he's designing, he's trying
4 to create a record for striking black jurors
5 that -- and -- and -- and for distinguishing
6 black jurors from white jurors by means of his
7 questioning, which is sort of, you know,
8 completely opposite from the questioning that
9 he gives to whites.

10 MR. DAVIS: I think the questions that
11 the district attorney asked were a direct
12 result of those responses these particular
13 jurors provided in general voir dire. And --

14 JUSTICE KAGAN: Well, I think what I'm
15 saying is it's not two jurors, one white, one
16 black, says I have reservations about the death
17 penalty, and he says to the white one: But you
18 could follow the law. And he says to the black
19 one: Well, I don't know, I guess you can't
20 follow the law.

21 MR. DAVIS: Respectfully, Your Honor,
22 that's not the case as I read the record. The
23 -- each juror that indicated they were against
24 the death penalty is certainly one that, in a
25 general context, that a prosecutor would not

1 want to be on the jury.

2 And, of course, we had in this case
3 vacillation amongst these jurors, for example,
4 Flancie Jones, who on her juror questionnaire
5 said she was strongly against the death penalty
6 and then, during questioning, said she could
7 consider it, but then went on to admit that she
8 lied on her juror questionnaire.

9 So the questions that the district
10 attorney asked were to follow up on what was on
11 the juror questionnaire with regard to their
12 statements therein regarding the death penalty.

13 In this case the record itself shows
14 that the district attorney offered valid
15 race-neutral reasons for each strike.

16 Each strike was considered by the
17 trial court who had made aware -- made the
18 parties aware of -- that he was aware of the
19 history of the case, and the record supports
20 that all the jurors that were struck were
21 struck because they were either sued by Tardy
22 Furniture, they were either related to the
23 defendant, or friends with, or had worked with
24 members of the defendant's family.

25 And these are all valid race-neutral

1 reasons.

2 JUSTICE GINSBURG: But there were no
3 questions of white jurors who said they had a
4 relationship with defense witnesses. There
5 were no follow-up questions for them. They
6 just said yes, they knew defense witnesses.

7 MR. DAVIS: The only -- to my
8 recollection, Justice Ginsburg, is Pamela
9 Chesteen, who indicated that she knew Flowers'
10 family but only because she was a bank teller
11 and she had seen them come in. Again, that was
12 a general question.

13 JUSTICE GINSBURG: We didn't -- we
14 don't know what the relationship of the others
15 were because they weren't asked. They said
16 they had a relationship with defense witnesses,
17 but they weren't asked what is the
18 relationship.

19 MR. DAVIS: I -- I'm sorry, I
20 misunderstood. Regarding the ones that said
21 they knew these witnesses in the case, Your
22 Honor, yes.

23 And the Mississippi Supreme Court
24 noted that, that they were. And, again, this
25 is part and parcel of the issue with this

1 unique case is that, you know, 5,000 people in
2 a town, everybody knows everybody. And
3 everybody knew everything about the case.

4 And the Mississippi Supreme Court
5 noted that these witnesses on both sides knew
6 numerous witnesses for both the prosecution and
7 the defense. And that is, of course, but one
8 part of the analysis.

9 You have to look at the reasons that
10 the -- that were offered by the district
11 attorney. And in this case they all support
12 the strikes that were --

13 JUSTICE KAVANAUGH: Well, the -- part
14 of Batson was about confidence of the community
15 and the fairness of the criminal justice
16 system, right?

17 MR. DAVIS: Yes, Your Honor.

18 JUSTICE KAVANAUGH: And that was
19 against a backdrop of a lot of decades of
20 all-white juries convicting black defendants.
21 Swain said let's put a stop to that but really
22 didn't give the tools for eradicating
23 discrimination. So you had another 21 years of
24 that until Batson.

25 And then Batson said: We're going to

1 give you the tools to eradicate that, so that
2 -- not just for the fairness to the defendant
3 and to the juror, but that the community has
4 confidence in the fairness of the system.

5 And can you say, as you sit here
6 today, confidently you have confidence in the
7 -- how this all transpired in this case?

8 MR. DAVIS: I have confidence in this
9 record, Justice Kavanaugh. I have confidence
10 in the strikes that this district attorney made
11 based on the four corners of this record.

12 I have confidence that, if reviewed
13 with an eye towards what actually transpired,
14 it supports the Mississippi Supreme Court's
15 decision in this case. That I have confidence
16 in.

17 JUSTICE KAVANAUGH: Thank you.

18 JUSTICE SOTOMAYOR: Do you have
19 confidence in how this case was prosecuted?

20 MR. DAVIS: Based on this record, yes,
21 Your Honor, I do.

22 JUSTICE SOTOMAYOR: You know, I -- one
23 of the first things I did when I found this
24 case was to try to do some research because at
25 least my former state prosecutor's office would

1 have substituted attorneys long before the
2 fifth, sixth trial.

3 Regrettably, I don't -- I wasn't able
4 to find any formalized guidance on that. But
5 it does seem odd to me that any prosecutor
6 would continue to try a case with this history.

7 MR. DAVIS: And, again, I would agree
8 completely, Justice Sotomayor, that we have an
9 unusual circumstance, an unusual case with
10 these six trials having been all tried by the
11 same prosecutor.

12 But I would resubmit, again, that the
13 decision of the Mississippi Supreme Court in
14 this instance was not violative of Batson and
15 its progeny.

16 Thank you, Mr. Chief Justice.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. You have four minutes remaining, Ms.
19 Johnson.

20 REBUTTAL ARGUMENT OF SHERI LYNN
21 JOHNSON ON BEHALF OF THE PETITIONER

22 MS. JOHNSON: Unless this Court has
23 further questions, I will waive rebuttal.

24 JUSTICE THOMAS: Ms. Johnson, did you
25 -- would you be kind enough to tell me whether

1 or not you exercised any peremptories?

2 MS. JOHNSON: I was not the trial
3 lawyer.

4 JUSTICE THOMAS: Well, did your --
5 were any peremptories exercised by the
6 defendant?

7 MS. JOHNSON: They were.

8 JUSTICE THOMAS: And what was the race
9 of the jurors struck there?

10 MS. JOHNSON: She only exercised
11 peremptories against white jurors.

12 But I would add that the motive -- her
13 motivation is not the question here. The
14 question is the motivation of Doug Evans.

15 JUSTICE SOTOMAYOR: She didn't have
16 any black jurors to exercise peremptories
17 against -- except the first one?

18 MS. JOHNSON: Except the first one.

19 JUSTICE SOTOMAYOR: But so did the
20 prosecutor, except that one?

21 MS. JOHNSON: Correct.

22 JUSTICE SOTOMAYOR: After that, every
23 black juror that was available on the panel was
24 struck?

25 MS. JOHNSON: Yes.

1 JUSTICE SOTOMAYOR: Fine.

2 MS. JOHNSON: He struck one -- he
3 seated one African American juror, and at the
4 very end struck one white juror.

5 When all of the evidence in this case
6 is considered, just as in Foster versus
7 Chapman, the conclusion that race was a
8 substantial part of Evans' motivation is
9 inescapable, and the Mississippi Supreme
10 Court's conclusion to the contrary is clearly
11 erroneous. Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel. The case is submitted.

14 (Whereupon, at 11:09 a.m., the case
15 was submitted.)

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